



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF C-H-H-S-, INC.

DATE: NOV. 25, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a home health care provider, seeks to permanently employ the Beneficiary as an operations manager under the immigrant classification of member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 203(b)(2)(A). The Director, Texas Service Center, denied the petition and the Petitioner's following motion to reopen. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the record did not establish the Petitioner's continuing ability to pay the Beneficiary the proffered wage from the petition's priority date onward. Accordingly, the Director denied the petition on August 15, 2011. On November 14, 2011, the Director denied the Petitioner's motion to reopen on the same ground.

The record indicates that the appeal is properly filed, timely, and alleges specific errors in law and fact. The record documents the case's procedural history, which will be incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record, including new evidence properly submitted on appeal.¹

A petitioner must establish its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

A petitioner's ability to pay a proffered wage is essential in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977). In determining ability to pay, we require a petitioner to demonstrate financial resources sufficient to pay a beneficiary's

¹ The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow submission of additional evidence on appeal.

proffered wage. However, we will also consider the totality of the circumstances affecting a petitioner's business. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanies the petition. The accompanying labor certification states the proffered wage for the offered position of operations manager as \$156,520 per year. The petition's priority date is September 22, 2010, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The record before us closed on April 30, 2013, with our receipt of the Petitioner's response to our request for evidence (RFE) dated February 5, 2013. The Petitioner's 2012 tax returns were then its most recent available. We will therefore assess the Petitioner's ability to pay from the petition's priority date until 2012.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary during the relevant period. A petitioner that documents its employment of a beneficiary at a salary equal to or greater than a proffered wage establishes its *prima facie* ability to pay the proffered wage.

In the instant case, the Petitioner submitted copies of IRS Forms W-2 Wage and Tax Statements for 2010 through 2012. The Forms W-2 indicate the Petitioner's payments to the Beneficiary of the following annual wage amounts:

- \$48,305.50 in 2010;
- \$92,439.84 in 2011; and
- \$79,984.30 in 2012.

The Petitioner also submitted copies of additional Forms W-2 for 2011 and 2012. The additional Forms W-2 indicate payments to the Beneficiary of \$25,600 in 2011 and \$6,400 in 2012. The additional forms indicate payments by a corporation with a similar name and the same address as the Petitioner. However, the forms reflect a federal employer identification number (FEIN) different than the Petitioner's.

The different FEIN on the additional Forms W-2 indicate the Beneficiary's payment by a different corporation than the Petitioner. Therefore, the additional Forms W-2 do not support the Petitioner's ability to pay the proffered wage. *See Sitar Rest. v. Ashcroft*, No. Civ. A. 02-30197-MAP, 2003 WL 22203713, *2 (D. Mass. Sept. 18, 2003) (stating that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [U.S. Citizenship and Immigration Services (USCIS)] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage").

The Forms W-2 issued by the Petitioner do not state wage amounts equaling or exceeding the annual proffered wage of \$156,520. Therefore, the record does not establish the Petitioner's continuing ability to pay based on the wages it paid to the Beneficiary. The Petitioner must establish its ability to pay the annual differences between the proffered wage and the amounts it paid the Beneficiary. Thus, the Petitioner must establish its ability to pay:

- \$108,214.50 in 2010;
- \$64,080.16 in 2011; and
- \$76,535.70 in 2012.

If a petitioner does not establish payments to a beneficiary in amounts equaling or exceeding a proffered wage, we next examine its net income figures, without consideration of depreciation or other expenses.² Lines 28 of the Petitioner's IRS Forms 1120 U.S. Corporation Income Tax Returns state the following annual net income amounts:

- \$11,715 in 2010;
- \$2,480 in 2011; and
- \$23,909 in 2012.

The annual net income amounts stated on the Petitioner's tax returns do not equal or exceed the annual differences between the proffered wage and the wage amounts the Petitioner paid the Beneficiary in the corresponding years. The record therefore does not establish the Petitioner's ability to pay based on its annual net income amounts.

If a petitioner's net income is insufficient to demonstrate its ability to pay, we review its net current assets. Net current assets represent the difference between current assets and current liabilities.³ Lines 1 through 6 of Schedule L to IRS Form 1120 state a corporation's year-end current assets. Lines 16 through 18 of Schedule L show a corporation's year-end current liabilities. If a corporation's year-end net current assets equal or exceed the annual difference between the proffered wage and the wages paid to a beneficiary, a petitioner demonstrates its ability to pay based on its net current assets.

In the instant case, the Petitioner's tax returns indicate the following annual net current asset amounts:

- \$65,553 in 2010;
- \$(92,307) in 2011;⁴ and
- \$(135,959) in 2012.

² Federal courts have upheld our method of determining ability to pay. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rivzi v. Dep't of Homeland Sec.*, -- Fed. Appx. --, 2015 WL 5711445, ** 1-2 (5th Cir. Sept. 30, 2015); *Tongatapu Woodcraft Haw. Ltd. v. Feldman*, 736 F.2d 1305, 1309-10 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

³ Current assets are those that generally may be liquidated within one year, such as cash, marketable securities, inventory, and prepaid expenses. Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Ed. Series 2000). Current liabilities are obligations generally payable within one year, such as accounts payable, short-term notes, and accrued expenses like taxes and salaries. *Id.*

⁴ Figures in parentheses reflect negative amounts.

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Matter of C-H-H-S-, Inc.

The annual net current asset amounts stated on the Petitioner's tax returns do not equal or exceed the annual differences between the proffered wage and the wages paid to the Beneficiary in the corresponding years. Thus, the record does not establish the Petitioner's possession of sufficient net current assets to pay the proffered wage.

Therefore, based on examinations of the wages the Petitioner paid to the Beneficiary and its annual amounts of net income and net current assets, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

If a petitioner employs 100 or more people, USCIS may accept a statement from a financial officer of the organization establishing its ability to pay a proffered wage. 8 C.F.R. § 204.5(g)(2). In response to the Director's RFE of May 23, 2011, the Petitioner submitted a June 8, 2011, letter from its executive vice president, stating the company's employment of 152 people and its ability to pay the proffered wage.

The Director did not abuse his discretion in finding the Petitioner's letter insufficient to establish its ability to pay. The letter stated the Petitioner's intention to employ the Beneficiary at an annual wage of \$124,800, below the annual proffered wage of \$156,520. In the Petitioner's motion to reopen, counsel asserted that the Petitioner "inadvertently" misstated the proffered wage in its letter. However, counsel's unsupported assertion does not establish facts of record. *See INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984). In addition, the record does not establish the Petitioner's executive vice president, who signed the letter, as "a financial officer of the organization" as required by 8 C.F.R. § 204.5(g)(2).

Also, USCIS records indicate the Petitioner's filing of at least 11 other immigrant visa petitions since 2007.⁵ A petitioner must demonstrate its ability to pay the proffered wage of each petition it files. *See* 8 C.F.R. § 204.5(g)(2). Therefore, as stated in our RFE, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its other petitions that remained pending after the instant petition's priority date. The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until the other petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 118, 124 (D. Mass. 2014) (upholding our denial of a petition where the petitioner did not establish its ability to pay the proffered wages of multiple beneficiaries).

In response to our RFE, the Petitioner identified only two of the petitions it filed since 2007. It also did not provide requested information about the petitions, including the proffered wages contained in them. The record therefore does not establish the Petitioner's continuing ability to pay the combined

⁵ USCIS records identify the petitions by the following receipt numbers:

[REDACTED]

proffered wages of the instant Beneficiary and the beneficiaries of its other petitions that remained pending after the instant petition's priority date.

The Petitioner also submitted copies of bank account and financial statements in support of its ability to pay the proffered wage. However, the Petitioner provides no evidence that it omitted the bank account balances from the annual current asset amounts stated in its tax returns. Because we considered the Petitioner's current assets in our net current asset analysis, the record does not establish the bank account balances as additional current assets available to pay the proffered wage.

Also, the record does not indicate that the Petitioner's financial statements were audited. As apparent, uncorroborated representations by the Petitioner, we will not credit the information in the financial statements. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (stating that uncorroborated assertions are insufficient to meet a petitioner's burden of proof in visa petition proceedings). The financial statements also appear to cover only the month of February 2013, which is beyond the period addressed in this decision and is also not a sufficiently long enough time by which to evaluate a business's continuing ability to pay a proffered wage.

As indicated previously, we may also consider the overall magnitude of a petitioner's business in determining its ability to pay a proffered wage. *See Sonegawa*, 12 I&N Dec. at 614-15. In *Sonegawa*, the petitioner conducted business for more than 11 years, routinely earning annual net income amounts of about \$100,000. However, in the year of the petition's filing, the petitioner's tax returns did not reflect its ability to pay. In that year, the record indicated the petitioner's relocation of its business, causing it to pay rent on two locations for a five-month period, to incur substantial moving costs, and to briefly suspend its business operations. Despite these setbacks, the Regional Commissioner determined the likely resumption of the petitioner's successful business operations and its demonstration of its ability to pay the proffered wage. The petitioner established the featuring of her work as a fashion designer in national magazines and her clients as the then Miss Universe, movie actresses, society matrons, and women on lists of the best-dressed in California. The record also indicated the petitioner's lectures at U.S. fashion shows and at California colleges and universities.

As in *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets. We may consider such factors as: the number of years the petitioner has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation within its industry; whether the beneficiary will replace a current employee or an outsourced service; and any other evidence of its ability to pay a proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since at least 1999 and its employment of more than 150 people in 2011. Its tax returns for 2010 through 2012 also reflect growing gross revenues and total wages paid.

However, unlike in *Sonegawa*, the record does not indicate the Petitioner's outstanding reputation in its industry or any uncharacteristic business losses or expenses. The Petitioner does not claim the

Beneficiary's replacement of a current employee or outsourced service. In addition, unlike in *Sonegawa*, the instant Petitioner must demonstrate its ability to pay the combined proffered wages of multiple beneficiaries. Further, government records indicate more than \$500,000 in outstanding tax liens against the Petitioner as of last year.

Thus, assessing the totality of the circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage. After careful consideration, we find that the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore dismiss the appeal.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the immigration benefit sought. INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of C-H-H-S-, Inc.*, ID# 13954 (AAO Nov. 25, 2015)